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NO. 79-898

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

JOHN D. EDGAR and JOYCE EDGAR,
husband and wife,

Petitioners,

v-

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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The Respondent State of Washington does not object to the statements of Petitioner contained in the sections Opinions Below, Jurisdiction, Questions Presented, and Statement of the Case in their Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ELEVENTH AMENDMENT, UNITED STATES CONSTITUTION:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SEC. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Washington law governing actions against the state provides in pertinent part:

RCW 4.92.010 WHERE BROUGHT--COST BOND--CHANGE OF VENUE.

Any person or corporation having any claim against the state of Washington shall have a right of action against the state in the superior court. The plaintiff in such action shall, at the time of filing his complaint, file a surety bond executed by the plaintiff and a surety company authorized to do business in the state of Washington to the effect that such plaintiff will indemnify the state against all costs that may accrue in such action, and will pay to the clerk of said court all costs in case the plaintiff shall fail to prosecute his action or to obtain a judgment against the state: *Provided:* That in actions for the enforcement or foreclosure of any lien upon, or to determine quiet title to, any real property in which the state of Washington is a necessary or proper party defendant no surety bond as above provided for shall be required.

The venue for such actions shall be as follows:

(1) the county of the residence or principal place of business of one or more of the plaintiffs;

(2) the county where the cause of action arose;

(3) The county in which the real property that is the subject of the action is situated.

(4) The county where the action may be properly commenced by reason of the joinder of an additional defendant; or

(5) Thurston county.

Actions shall be subject to change of venue in accordance with statute, rules of court, and the common law as the same now exist or may hereafter be amended, adopted, or altered.

Actions shall be tried in the county in which they have been commenced in the absence of a seasonable motion by or on behalf of the state to change the venue of the action.

RCW 4.92.090 TORTIOUS CONDUCT OF STATE--LIABILITY FOR DAMAGES

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.92.140 COMPROMISE AND SETTLEMENT OF CLAIMS BY HEAD, GOVERNING BODY OR DESIGNEE OF AGENCY OR DEPARTMENT

The head or governing body of any agency or department of state government or the designee of any such agency, with the approval of the attorney general, may consider, ascertain, adjust, determine, compromise, and settle any claim arising out of

tortious conduct or under and pursuant to 42 U.S.C. Sec. 1981 et seq. for which the state of Washington or any of its officers or employees would be liable in law for money damages of ten thousand dollars or less. The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant; and upon the state of Washington, unless procured by fraud, and shall constitute a complete release of any claim against the state of Washington or its affected officer or employee. A request for administrative settlement shall not preclude a claimant from filing a court action pending administrative determination, limit the amount recoverable in such a suit, or constitute an admission against interest of either the claimant or the state.

RCW 4.92.150 COMPROMISE AND SETTLEMENT OF CLAIMS BY ATTORNEY GENERAL

After commencement of an action in a court of competent jurisdiction upon a claim against the state, or any of its officers or employees arising out of tortious conduct or pursuant to 42 U.S.C. Sec. 1981 et seq., the attorney general . . . may compromise and settle the same and stipulate for judgment against the state, the affected officer or employee.

RCW 4.92.160 PAYMENT OF CLAIMS AND JUDGMENTS

Payment of claims and judgments arising out of tortious conduct or pursuant to 42 U.S.C. Sec. 1981 et seq. shall not be made by any agency or department of the state government with the exception of the budget director, and he shall authorize and direct the payment of the moneys only from the tort claims revolving fund whenever:

. . .

(2) The clerk of the court has made and forwarded a certified copy of a final judgment in a court of competent jurisdiction and the attorney general certifies that the judgment is final and was entered in an action on a claim arising out of tortious conduct or under and pursuant to 42 U.S.C. Sec. 1981 et seq. Payment of a judgment shall be made to the clerk of the court for the benefit of the judgment creditors. Upon receipt of payment, the clerk shall satisfy the judgment against the state.

REASONS FOR DENYING THE WRIT

Petitioners challenge the decision of the Washington Supreme Court on two grounds: (1) that the court incorrectly interpreted this Court's opinion in *Quern v. Jordan*, 440 U.S. 332 (1979) by

holding that *42 U.S.C. § 1983* does not provide a remedy against a state in state court; and (2) that the court incorrectly refused to recognize a common law right to redress for deprivation of constitutionally protected rights.

Petitioner inaccurately states that Washington's statutory waiver of sovereign immunity includes waiver as to actions brought pursuant to *42 U.S.C. § 1981 et seq.* in state court. The statement is inaccurate for four reasons:

1. The waiver statute, *RCW 4.92.090*, expressly waives sovereign immunity only for "damages arising out of its [the state's] tortious conduct." [Emphasis supplied.] This waiver is only to the bar to jurisdiction of the state's superior courts. *RCW 4.92.010*. The state has not waived its sovereign immunity protected by the *Eleventh Amendment*.

2. *RCW 4.92.090* was enacted in 1961 and amended in 1963 at which times the law was understood to be that states were not "persons" under *42 U.S.C. § 1981 et seq.* *See Monroe v. Pape*, 365 U.S. 167, 190 (1961); *Williford v. People of California*, 352 F.2d 474, 476 (9th Cir. 1965). Rules of statutory construction presume that in enacting legislation, the legislature is aware of the contemporary law and a statute is to be interpreted in light thereof. *2A D. Sands, Sutherland Statutory Construction* (Rev. 3d ed. 1973) § 50.01 at 268. Therefore, a waiver of sovereign immunity as to "tortious conduct" cannot be construed to have intended also a waiver to suits brought pursuant to *42 U.S.C. § 1983*.

3. The authorization provided in *RCW 4.92.140, .150 and .160* for settlement, compromise and payment of claims and judgments "arising out of tortious conduct or pursuant to *42 U.S.C. § 1981 et seq.*" does not broaden the scope of the state's waiver of sovereign immunity in *RCW 4.92.090*, but instead reflects a policy expressed in amendments to those sections in 1975 to indemnify state employees for settlements made on their behalf or judgments against them arising out of actions performed in good faith within the course of their official duties. *See Washington Laws of 1975, 1st Ex. Sess., ch. 126, App. "A"*. The legislation authorizing indemnification for employees necessarily broadens the scope of that protection to include claims brought pursuant to *42 U.S.C. § 1981 et seq.* in order to provide the employees with complete protection against claims arising out of their performance of their official duties. The limited intent of those amendments is evidenced by the fact that the waiver statute, *RCW 4.92.090*, was not similarly amended.

4. It is not appropriate for this Court to interpret the waiver statute, *RCW 4.92.090*, in a manner broader than the construction given it by the Washington Supreme Court. The Washington Court noted:

> As we understand the plaintiff, he concedes that his suit is unprecedented but believes that the wrongs allegedly done him are ones for which the courts should create a damage action. However, we are

> here concerned with a state statute which we are not at liberty to extend beyond the intent expressed in the act. The statute was not designed to create new causes of action. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). As we said in *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965), the statute does not render the State liable for every harm that may flow from governmental actions, but only the harm which is the result of tortious misconduct.

Edgar v. State, 92 Wn.2d 217, 228, 595 P.2d 534, 541 (1979), Petition, App. "A", pp. 26-27.

Petitioners' argument of state waiver is inapposit, not only because the State of Washington has not waived immunity to suit brought pursuant to *42 U.S.C. § 1981 et seq.*, but also because state waiver cannot create a cause of action under a federal statute not intended to include within its ambit suits for damages against states.

In *Quern v. Jordan*, 440 U.S. 332 (1979) this Court held that Congress did not intend to include states in the category of "persons" under *42 U.S.C. § 1983*. The rationale of the Court recognized that Congress enacted the *Civil Rights Act of 1871* in the shadow of the *Eleventh Amendment* and the strong tradition of the states' sovereign immunity.

> . . . we simply are unwilling to believe . . . that Congress intended by the general language of § 1983 to override the traditional

> sovereign immunity of the States, We therefore conclude that neither the reasoning of *Monell* or of our Eleventh Amendment cases subsequent to *Edelman*, nor the additional legislative history or arguments set forth in Mr. Justice Brennan's concurring opinion, justifies a conclusion different from that which we reached in *Edelman*.
>
> There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive province of the individual States. Many of the remarks from the legislative history of the Act quoted in the concurring opinion amply demonstrate this point. *Post*, at 12-16. See also *Monroe v. Pape*, 365 U.S. 167, 173-176 (1961). But neither logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compel, or even warrant, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States. [Footnotes omitted.]

440 U.S. at 341-342. Since Congress did not intend to include states within the scope of § 1983, a state's waiver of sovereign immunity nearly a century later cannot change the scope of the federal act.

What petitioners fail to appreciate is that the Washington Supreme Court's holding, for which they seek review, was not based on the *Eleventh Amendment* directly but rather on an interpretation of the *Civil Rights Statute* in light of the *Eleventh Amendment*.

> The plaintiff argues that Congress may nevertheless have intended to permit such suits in state courts. However, he points to no language of the act which would justify such an interpretation. . . .
>
> The question before the court in *Quern*, as Justice Brennan's dissent quite clearly points out, was whether the word "person" as used in this statute included states. It is the inescapable holding of the court that it did not.

Edgar v. State, 92 Wn.2d 217, 221, 595 P.2d 534, 537 (1979), Petition, App. "A", p. 18. The Washington Supreme Court held that petitioners could not state a claim under § 1983 nor under the substantive law of the State of Washington. The court's decision was based on the congressional intent of 1983 as interpreted in *Quern* and the common law of the State of Washington.

Because the bar of the *Eleventh Amendment* was not the direct reason for petitioners' failure to state a claim, the fact that their suit was brought in state court does not distinguish it from an action brought in federal court. Under *Quern v. Jordan, supra*, petitioners have failed to state a claim upon which relief

can be granted under § *1983* irrespective of whether the complaint was filed in federal or state court.

Petitioners claim to a common law remedy does not provide a federal question to which this court should give cognizance.

CONCLUSION

For whatever reason, petitioners failed to seek redress through the administrative and judicial remedies which the Washington Court observed were readily available to them. Instead they have attempted to state a claim which by their own admission is unprecedented. They have, however, failed tc state a claim upon which relief can be granted because *42 U.S.C.* § *1983* does not give rise to a damage action against a state, irrespective of whether it be brought in federal or state court. The Washington Supreme Court, therefore, properly interpreted this Court's holding in *Quern v. Jordan, supra*. This being the only federal question raised by petitioners, their petition for Writ of Certiorari should be denied.

DATED this 2d day of January, 1980.

Respectfully submitted,

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APPENDIX "A"

1975 SESSION LAWS
STATE OF WASHINGTON
1st EXTRAORDINARY SESSION
FORTY-FOURTH LEGISLATURE

CHAPTER 126

[Engrossed Substitute Senate Bill No. 2133]
ACTIONS ARISING FROM ACTS OR OMISSIONS OF STATE PERSONNEL

AN ACT Relating to actions against the state, its officers, employees and agents; amending section 1, chapter 79, Laws of 1921 as amended by section 1, chapter . . ., (EHB 106), Laws of 1975 and RCW 4.92.060; amending section 2, chapter 79, Laws of 1921 as amended by section 2, chapter . . ., (EHB 106), Laws of 1975 and RCW 4.92-.070; amending section 7, chapter 159, Laws of 1963 as amended by section 1, chapter 140, Laws of 1969 and RCW 4.92-.130; amending section 8, chapter 159, Laws of 1963 and RCW 4.92.140; amending section 9, chapter 159, Laws of 1963 and RCW 4.92.150; amending section 10, chapter 159, Laws of 1963 as amended by section 2, chapter 140, Laws of 1969 and RCW 4.92.160; amending section 11, chapter 159, Laws of 1963 as amended by section 3, chapter 140, Laws of 1969 and RCW 4.92.170; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 1, chapter 79, Laws of 1921 as amended by section 1, chapter ..., (EHB 106, Laws of 1975 and RCW 4.92.060 are each amended to read as follows:

Whenever an action or proceeding for damages shall be instituted against any state officer, including state elected officials, or employee ((~~for the performance of any official act~~)), arising from his acts or omissions while performing, or in good faith purporting to perform, his official duties, such officer or employee may request the attorney general to authorize the defense of said action or proceeding at the expense of the state.

Sec. 2. Section 2, chapter 79, Laws of 1921 as amended by section 2, chapter ..., (EHB 106, Laws of 1975 and RCW 4.92-.070 are each amended to read as follows:

If the attorney general shall find that said officer or employee's ((~~acted in good faith and without negligence~~,)) acts or omissions were, or purported to be in good faith, within the scope of his official duties, said request shall be granted, in which event the necessary expenses of the defense of said action or proceeding shall be paid from the appropriations made for the support of the department to which such officer or employee is attached. In such cases the attorney general shall appear and defend such officer or employee, who shall assist and cooperate in the defense of such suit.

Sec. 3. Section 7, chapter 159, Laws of 1963 as amended by section 1, chapter 140, Laws of 1969 and RCW 4.92-.130 are each amended to read as follows:

A tort claims revolving fund in the custody of the treasurer is hereby created to be used solely and exclusively for the payment of claims against the state arising out of tortious conduct and against its officers and employees for whom the defense of the claim was authorized under section 2 of this 1975 amendatory act. No money shall be paid from the tort claims revolving fund unless all proceeds available to the claimant from any valid and collectible liability insurance shall have been exhausted and unless:

(1) The claim shall have been reduced to final judgment in a court of competent jurisdiction; or

(2) The claim has been approved for payment in accordance with RCW 4.92.140 as herein or hereafter amended.

Sec. 4. Section 8, chapter 159, Laws of 1963 and RCW 4.92.140 are each amended to read as follows:

The head or governing body of any agency or department of state government, with the approval of the attorney general, may consider, ascertain, adjust, determine, compromise and settle any claim arising out of tortious conduct or under and pursuant to 42 U.S.C. Sec. 1981 et seq. for which the state of Washington or any of its officers or employees would be liable in law for money damages of ((~~five~~)) twenty-five hundred dollars or less. The acceptance by the claimant of any such award, compromise or settlement shall be final and conclusive on the claimant; and upon the state of Washington, unless procurred by fraud, and shall constitute a complete release of any claim against the state of Washington or its affected

officer or employee. A request for administrative settlement shall not preclude a claimant from filing a court action pending administrative determination, limit the amount recoverable in such a suit or constitute an admission against interest of either the claimant or the state.

Sec. 5. Section 9, chapter 159, Laws of 1963 and RCW 4.92.150 are each amended to read as follows:

After commencement of an action in ((~~superior court~~)) a court of competent jurisdiction upon a claim against the state, or any of its officers or employees arising out of tortious conduct or pursuant to 42 U.S.C. Sec. 1981 et seq., the attorney general, with the approval of the court, following such testimony as the court may require, may compromise and settle the same and stipulate for judgment against the state, the affected officer or employee.

Sec. 6. Section 10, chapter 159, Laws of 1963 as amended by section 2, chapter 140, Laws of 1969 and RCW 4.92.160 are each amended to read as follows:

Payment of claims and judgments arising out of tortious conduct or pursuant to 42 U.S.C. Sec. 1981 et seq. shall not be made by any agency or department of state government with the exception of the budget director, and he shall authorize and direct the payment of moneys only from the tort claims revolving fund whenever:

(1) The head or governing body of any agency or department of state certifies to him that a claim has been settled under authority of RCW 4.92.140 as herein or hereafter amended; or

(2) The clerk of court has made and forwarded a certified copy of a final judgment in a court of competent jurisdiction and the attorney general certifies that the judgment is final and was entered in an action on a claim arising out of tortious conduct or under and pursuant to 42 U.S.C. Sec. 1981 et seq.. Payment of a judgment shall be made to the clerk of the court for the benefit of the judgment creditors. Upon receipt of payment, the clerk shall satisfy the judgment against the state.

Sec. 7. Section 11, chapter 159, Laws of 1963 as amended by section 3, chapter 140, Laws of 1969 and RCW 4.92.170 are each amended to read as follows:

Liability for and payment of claims arising out of tortious conduct or under and pursuant to 42 U.S.C. Sec. 1981 et seq. is declared to be a proper charge as part of the normal cost of operating the various agencies and departments of state government whose operations and activities give rise to the liability and a lawful charge against moneys appropriated or available to such agencies and departments.

Within any agency or department the charge shall be apportioned among such appropriated and other available moneys in the same proportion that the moneys finance the activity causing liability. Whenever the operations and activities of more than one agency or department combine to give rise to a single liability, the budget director shall determine the comparative responsibility of each agency or department for the liability.

State agencies over which the budget director has authority to revise allotments under chapter 43.88 RCW shall make reimbursement to the tort claims revolving fund for any payment made from it for the benefit of such agencies. The budget director is authorized and directed to transfer or order the transfer to the revolving fund, from moneys available or appropriated to such agencies, that sum of money which is a proper charge against them. Such amounts may be expended for the purposes for which the tort claims revolving fund was created by RCW 4.92.130 as herein or hereafter amended without further or additional appropriation: PROVIDED, That in any case where reimbursement would seriously disrupt or prevent substantial performance of the operations or activities of the state agency, the budget director may relieve the agency of all or a portion of the obligation to make reimbursement.

The budget director shall report to the legislature, for any biennial period, on the status of the tort claims revolving fund, all payments made therefrom, all reimbursements made thereto, and the identity of agencies and departments of state government whose operations and activities give rise to liability, including those agencies and departments over which he does not have authority to revise allotments under chapter 43.88 RCW.

The budget director may authorize agencies, in accordance with chapter 41.05 RCW to the extent that it is applicable, to purchase insurance to protect and hold

personally harmless any officer or employee of the state, or any classes of such officers or employees or for other persons performing services for the state, whether by contract or otherwise, from any action, claim, or proceeding for damages arising out of the performance of duties for, employment with, or the performance of services on behalf of the state and to hold him harmless from any expenses connected with the defense, settlement or monetary judgment from such actions.

The budget director shall adopt rules and regulations governing the procedures to be followed in making payment from the tort claims revolving fund, in reimbursing the revolving fund and in relieving an agency of its obligation to reimburse.

NEW SECTION. Sec. 8. This 1975 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing institutions, and shall take effect immediately.

Passed the Senate May 23, 1975
Passed the House May 22, 1975
Approved by the Governor May 31, 1975
Filed in Office of Secretary of State
May 31, 1975.